IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 18

DAVID FRIEDBERG,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR THE PETITIONER

ROBERT N. GORMAN,
STANLEY A. SILVERSTEEN,
Attorneys for Petitioner.

GORMAN, SILVERSTEEN & DAVIS,
808 Traction Building,
Cincinnati 2, Ohio,
Of Counsel.

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THE PROSECUTION FAILED TO ESTABLISH THE STARTING POINT NET WORTH

Respondent apparently does not comprehend the petitioner's argument. Petitioner divided his starting point argument into two propositions. The circumstantial evidence, upon which the prosecution relied solely, was too vague, and susceptible to too many inferences, as equally consistent with innocence as with guilt, to permit a jury to speculate with a man's liberty. Secondly, that same circumstantial evidence is too remote in point of time from the date on which petitioner is first credited with cash on hand.

The undisputed facts show that the entire prosecution was based on an arbitrary and rash allocation of cash and bonds which the petitioner had on hand in 1947, and

which he *voluntarily* disclosed to the agents. The record shows that if petitioner had any intention of defrauding the government, he did not have to, and would not, have made this disclosure. Yet the entire prosecution is based on the voluntary disclosure of assets, about which the agents did not know and could not have known anything. On his second visit to petitioner, at the very beginning of the investigation, the agent casually inquired if petitioner owned any bonds (R. 409). Co-operating completely, petitioner replied that he owned bonds, and that they were in the safety deposit box, although the agent was unaware of the existence of that or of any other box (R. 409, 85-86). Petitioner then insisted that they immediately examine the box, and they did so, together with a deputy collector (R. 409). The bonds ($53,625.00) and the cash ($19,600.00) which were found in the box (R. 83, 82) seemed to affect the judgment of the deputy collector, for he instantly made up his mind:

> "Mr. Friedberg, we are going to take a slice of this." (R. 415).

This statement was made despite the fact that the investigation was just beginning, and despite the fact that the agent had not even seen petitioner's books (R. 408). After three years of investigation, the evidence produced was as weak as the judgment was rash, and no effort was ever made to claim any additional income, except that claimed to be represented by what was found in the safety deposit box.

The conviction here is based upon an assumption that apparent increases in visible net worth are attributable to current income, even without specific evidence of understatement of income, or without proof of a concealed source of taxable income. This is the assumption which

shifts the burden of proof to the defendant in criminal proceedings. To be specific, if this conviction is proper, a jury is permitted to disregard inferences which are highly consistent with innocence, to select an inference that the financial status of the petitioner is, in a general way, insecure, to assume that such insecurity continued without the slightest change for as long as fifteen years, from such assumed status to infer that *both* petitioner *and his wife* had no cash, to infer that the bond purchases were made from income which was current in the indictment years, and finally to conclude that, since the purchases exceeded his reported income, he must have failed to report income. The defendant would then have to assume the burden of dispelling these inferences and assumptions.

This house of cards is based upon evidence concerning the starting point which, as respondent apparently concedes (Br. 25), is highly susceptible to infererecs consistent with innocence when viewed item by item, but which, as respondent claims (Br. 25), suggests an atmosphere of guilt when viewed in panorama. Petitioner urges that this is precisely the situation in which an untrained jury becomes confused, and in which a motion for acquittal must be directed to the analytical mind of the judge.

Respondent argues solely that conviction based upon this mass of vague, remote facts, conflicting inferences, assumptions, and inferences based on assumptions, has the sanction of this Court, under the rule of *United States* v. *Johnson*, 319 U. S. 503. This is the argument which has been used so often, to sustain convictions under the widest use of the net worth method, that it has evoked storms of protest from those Courts of Appeal which see no reason why an accused tax-evader should be tried with less due process than a murderer or a kidnapper. *United States*

v. *Caserta*, 199 F. (2d) 905, 907 (C. A. 3); *Demetree* v. *United States*, 207 F. (2d) 892, 894 (C. A. 5).

A reading of *United States* v. *Johnson*, *supra*, discloses a total lack of identity with the instant case. The most striking difference between the two cases appears at page 516 of the opinion of this Court in the *Johnson* case:

> "The decisive issue of fact was whether Johnson's relation to these resorts was that of a *patron* or of a *proprietor*." (Emphasis added.)

A concealed source of unreported income is not an issue at all in the instant case, much less is it the "decisive issue." The only source of income during the indictment years was a tailoring business which petitioner had openly operated for twenty five years, a little, three-man business which respondent claims produced only $2,587.00 in profits in 1943 (Ex. 1-H, fol. 14, R. 688), but a fantastic profit of $42,000.00 in 1947 (R. 3). The decisive issue in the instant case is the establishment of the starting point net worth.

The importance of this difference between the *Johnson* case and the instant case is apparent in the development of the two cases. In the former, the critical fact is first proved that Johnson was a co-owner of the six gambling houses. It was then proved that the six gambling houses produced profits, or income. Johnson's returns proved that he had never reported income from the gambling houses. From such solid facts, the jury was permitted to infer that Johnson failed to report income "of a substantial amount." That he failed to report income "was reinforced" by proof of excessive expenditures. This solidly-established, step by step development is in complete contrast to the proof in the instant case. Here, the critical fact to be established is the net worth of petitioner

on December 31, 1945, which is the date on which petitioner is first credited with cash. The manner in which this critical fact was allegedly established is that the prosecution introduced proof of isolated facts back in the 1920's and the 1930's. These facts are susceptible of many and varying inferences, some consistent with innocence, some with guilt. The jury is asked to select that inference which, in a vague way, points to an unstable financial condition of petitioner. The jury must then assume that such vaguely unstable financial condition continues without change for as long as fifteen years. Based on this assumption, the jury must infer that the 1944-1947 bond purchases were made out of current income, which was not reported. Petitioner submits that the difference between a single inference, based on solidly established, "decisive" facts, contrasted with an inference, based on an assumption, based on an inference which is tenuously selected from conflicting inferences, is the difference between an affirmance and a reversal of a conviction. If the instant case is an example of a case proven under the net worth method, the *Johnson* case is not.

Even the evidence which was introduced in the *Johnson* case is completely different in nature from the evidence in the instant case. The dissent in the Court of Appeals characterized the evidence in the former case as "not even circumstantial," but as "direct and positive" (*United States* v. *Johnson*, 123 F. (2d) 111, 140). The only fault found with the evidence by the majority of the Court of Appeals is that the evidence proved conclusively that Johnson was merely a part owner, rather than a sole owner (ibid, p. 124). This Court reversed on the grounds that proof of partial ownership was sufficient, holding that it was "not a matter of tenuous speculation but of *solid proof* that there were winnings of a substantial amount which Johnson did not report." (Emphasis added.)

(*United States* v. *Johnson*, 319 U. S. 503, 517.) Contrasted with this "meticulous" proof, is the complete reliance on purely circumstantial vidence alone in the instant case (R. 648), together with the use of inferences, of assumptions, and of further inferences based on the assumptions.

In his Brief, petitioner pointed out the conflicting inferences to which the evidence is susceptible, employing that summary of the evidence which respondent so carefully selected in its Brief in Opposition (page 4 thereof), and which is now characterized as a partial account, in the Brief on the merits. In order to demonstrate the insufficiency of the evidence, the improper use of inferences, of assumptions based on the inferences, and of further inferences based on the assumptions, which is the real test here, rather than whether the jury was "entitled to disbelieve the testimony of petitioner and his wife "that they had accumulated cash (Res. Br. 18), petitioner will merely point out certain instances in which the prosecution evidence actually contradicted itself, and precluded the jury from drawing the inference of guilt.

1) The income tax filing record is supposed to support an inference as to the maximum income received by petitioner. However, the prosecution's expert testified that it was impossible to figure backwards to compute petitioner's pre-1942 income (fol. 22-23). And prosecution witness Cohen testified that petitioner received more salary (R. 36) that the theoretical computation allowed (e.g., Res. Br. 27), and the prosecution's chief investigator testified (R. 149) that he did not know what "cash would arise" from petitioner's trading in, and rental of, real estate.

2) The mortgage foreclosures are supposed to require an inference of *inability* to pay the obligations, but there is no suggestion that petitioner would benefit financially from such a payment, of *desirability* of payment. As a

matter of fact, the successful non-payment of obligations almost inevitably results in a financial gain.

3) Levies of execution—Forgetting the question of admissibility, and referring only to the question of substantiality, this evidence is the rankest form of hearsay. Obviously, the returns of "no goods found" were office returns, since the loan application (Ex. 7, R. 19, 732 A—732 B), as well as the First Federal Savings Account (Ex. 2-C, R. 37, 695) and the Vercoe Account (Ex. 2-N, R. 38, 703) shows that at the time of the levies, the petitioner did have property, and the testimony of Cohen (R. 28-30, 36) shows that petitioner owned stock in a corporation and drew a salary.

4) Corporate dissolution—Three co-owners of a corporation did not possess the *joint* capital to continue past early 1941, but one of them, singly, could continue the operation, and show a profit, as respondent contends, of $16,140.00 in 1944. The only inference which can possibly be drawn from this evidence is in direct opposition to the one required by the prosecution.

5) Safety deposit box entries by petitioner total only forty five from 1941 through 1945, as contrasted with thirty five entries in 1946 and 1947 (R. 130-131; Ex. 12 A and 13, R. 67-68, 736-742). But since petitioner is not credited with cash until December 31, 1945, the jury must infer that he visited his box prior to that date merely to examine worthless papers.

6) The very final inference which the prosecution asked the jury to draw is inconsistent and contradictory. The petitioner is supposed to have been completely honest for almost thirty years, and then he unexplainedly concealed $50,000.00 in 1944 to 1946, and was stupid enough to conceal $37,553.86 in the return which he filed on January 15, 1948, almost four months after he knew that he was under investigation.

It is no wonder, in view of the insufficiency of such evidence, that the respondent insists so strenuously that the loan application (Ex. 7, R. 19, 732) constitutes an admission which fixes exactly petitioner's net worth on October 20, 1939. However, respondent forgets one tremendously important fact, the signature on the loan application is that of David Friedberg *alone*, and, as respondent points out on page 33 of its Brief, *petitioner and his wife always considered the cash savings to be the wife's money* (R. 264-275, 329-334, 418-419, 430, 463-465, 469-473). Respondent would establish the starting point net worth of petitioner *alone*, and then compute his increased net worth by adding to it assets which belonged to the wife and to the son (Ex. 2, R. 38, 691, assets stipulated to by defense). This is neither good mathematics, nor good law.

But even apart from this consideration, the financial statement annexed to the loan application, can by no means be considered as an admission of the *maximum* assets possessed by petitioner in 1939.

The strained inference urged by respondent requires a re-examination of the use and function of admissions. Wigmore points out (Wigmore on Evidence, 3rd Ed., Vol. IV, Section 1048) that an admission has a two-fold "probative value." First, it can be used for impeachment; but this does not bear on the burden of proof issue here under discussion. Second, admissions "have such testimonial value as belongs to any testimonial assertion *under the circumstances;* and the more notably they run *counter* to the natural bias or *interest* of the party *when made*, the more credible they become; this element adding to their probative value, but not being essential to their admissibility." (Emphasis added.) The "circumstances" surrounding the loan application, "when made," were not those which created an "interest" in petitioner in 1939 to list the *maximum* assets possessed by *himself, his wife,*

and *his children*. He sought a loan of $7,600.00, secured by a first mortgage lien on real estate, which the National Life Insurance Co. stated on the application as having an appraised value of $9,650.85 (Ex. 7, R. 19, 732 A). There was no reason, or obligation, to list every cent he had. The lending institution and the F.H.A. merely had to be satisfied that the property had the proper valuation, and that he was a good risk. As Wigmore points out (Wigmore on Evidence, supra, Sec. 1049), even a full-fledged admission "*is not in any sense final or conclusive,*" and prosecution exhibits 2-C (R. 37, 695) and 2-N (R. 38, 703) prove that the loan application was not conclusive. The trial court should not have permitted the jury to speculate on the probative effect of the loan application.

The real weakness of this evidence is most strikingly apparent in its effect upon the jury. The jury found the petitioner not-guilty in 1944, but guilty in 1945, 1946, and 1947. Respondent tries to explain this impossible result (Br. 50 *et seq.*) on the grounds that proof of *intent* was weakest for 1944. But that argument ignores the fact that proof of the *starting point* net worth was the same for *all* years. Petitioner's visible net worth apparently increased $13,404.71 in 1944 (Pet. Br. 5). Since the assets on the net worth schedule had been stipulated, this substantial increase had to arise from savings, or from current income. In a progressing mathematical computation of increasing net worth, this large sum had to come from some source, and a verdict of not-guilty could only mean that the starting point had not been established to the satisfaction of the jury. Such a finding of insufficiency would have to apply to the other years also, no matter how strong the evidence for those years was on opportunity or motive. This is no argument on inconsistency of verdicts, but is a problem peculiar to a net worth increase case. It is the reasoning employed in granting motions for acquittal,

after such a split verdict, in *United States* v. *George L. Allen* (S. D., Calif., October 20, 1950), Prentiss Hall, par. 72, 784; 1950 C. C. H. 9494.

THE OPINION OF A NON-EXPERT ON THE DECISIVE FACTUAL ISSUE SHOULD HAVE BEEN EXCLUDED

There is absolutely no comparison between the testimony of agent Clifford in *United States* v. *Johnson, supra*, and the testimony of agent Clager in the instant case. At page 126 of the Court of Appeals opinion in the former case [123 F. (2d) 111], the majority stated flatly concerning Clifford:

> "He qualified as an expert accountant."

In the instant case, the prosecution made no attempt to qualify Clager as an expert at anything, and defense counsel ascertained that he certainly was not an expert accountant. Respondent (Br. 40) would attempt to make Clager into an expert by claiming that petitioner's counsel conceded such status in their brief before the Court of Appeals. A reference to that appellate brief discloses that counsel there merely used the word "Granted" in the sense of "assuming *arguendo*." This is a far cry from the qualification of an expert.

The distinction between the testimony of the two agents is just as absolute in its contents. Clifford "made an analysis and computation based on Governments exhibits (naming 400 exhibits) and other evidence *in the record* to determine the amount of net cash income reported by the defendant" (emphasis added) [123 F. (2d) 111, 126]. Clager "did not include currency at the end of the year 1941 because *my investigation* disclosed no evidence which would permit me" (emphasis added) (R. 139). Clifford's testimony consisted of computations of income reported,

of expenditures, of gross income, and of tax still due, all based "on these exhibits and the evidence in the record" [123 F. (2d) 111, 126-127]. Clager's testimony consisted of his opinion on the "decisive issue of fact" which existed for the jury's determination, the issue of whether petitioner possessed cash, and this opinion was based on his "investigation," not on the record alone.

Clager was not an expert: his testimony was not that which is permitted as expert testimony. The motions of defence counsel to exclude the objectionable portions should have been granted.

THE SUA SPONTE INSTRUCTION TO "COMPROMISE" REQUIRES REVERSAL

Respondent evidently feels that if a court gives enough correct instructions to a jury, it becomes permissible to inject an improper instruction into the charge, "for whether a jury is properly instructed cannot be determined from consideration of a single paragraph, sentence, phrase or word" (Br. 47-48). It is perfectly true that an entire charge must be examined, to determine whether the basic issues have been treated unequivocally, or to determine whether the charge is misleading. But one does not have to read ten pages of record to ascertain if the court told the jury to "compromise" its verdict.

Beginning at page 50 of its Brief, respondent sets out a lengthy analysis of the evidence, stressing the fact that the understatements charged in 1947 ($37,553.86), in 1946 ($18,091.41), and in 1945 ($20,156.82), "were considerably greater than the understatement charged for 1944 ($13,404.71), all for the purpose of explaining the split, compromise verdict. But this evidence all pertains *entirely* to *motive* or *intent*, and has not the slightest reference to the establishment of a *starting point net worth*. Since the asset

figures on the net worth schedule were stipulated, petitioner *did* enjoy an apparent increase in visible net worth, largely through bond purchases. This resulted either from cash savings, or from current income. In a progressing mathematical computation of increasing net worth, the $13,404.71 increase had to come from some place, and a verdict of not guilty in 1944 could only mean that the starting point had not been established to the satisfaction of the jury. It is no explanation to argue that proof of intent was weaker in the 1944 period.

But the real issue is whether the Courts of Appeals of the Circuits may set forth their own varying interpretations of Rule 52 (b) of the Federal Rules of Criminal Procedure, or whether this Court will carry to fruition the purpose of the Advisory Committee that Rule 52 (b) shall be a codification of existing law. "Plain errors or defects affecting substantial rights," even though not excepted to, should be considered on appeal, particularly when the error is not contained in a charge, but merely occurs in an unfortunate *sua sponte* comment about the non recess, which comment worried its author to such an extent that he inquired about it on five occassions during argument on the motions after trial (R. 661-663), and then said, before passing sentence:

> "if the Court committed any error in its instructions, an upper Court will have to determine that fact." (R. 667.)

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed, and the case remanded to the District Court with directions to enter judgment of acquittal.

Respectfully submitted,
ROBERT N. GORMAN,
STANLEY A. SILVERSTEEN,
Attorneys for Petitioner.

GORMAN, SILVERSTEEN & DAVIS,
808 Traction Building,
Cincinnati 2, Ohio,
Of Counsel.